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No. 99

In the Supreme Court of the United States

OCTOBER TERM, 1962

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BOSTON AND MAINE RAILROAD ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the United States District Court for the District of Massachusetts (Woodbury, Sweeney and Ford JJ.) (R. 3994–4005) is officially reported at 202 F. Supp. 830. The report of the Interstate Commerce Commission dated December 5, 1960, *Equalization of Rates at North Atlantic Ports* (R. 3738–3820), is reported at 311 I.C.C. 689, and the Commission's report on reconsideration dated June 15, 1961 (R. 3836–3857), is reported at 314 I.C.C. 185.

JURISDICTION

The judgment of the District Court (R. 4006) was entered on February 23, 1962. Notice of appeal was

filed in that Court by the Interstate Commerce Commission on March 30, 1962 (R. 4024–4026), and this Court noted probable jurisdiction on October 8, 1962 (R. 4027). The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C. preceding § 1), and the pertinent provisions of the Interstate Commerce Act are set forth in the Appendix to this brief.

QUESTIONS PRESENTED

1. Whether the District Court erred in rejecting the Commission's conclusion that enforced equalization of rail rates on export-import traffic moving between the North Atlantic ports and a defined interior territory, would result in undue preference of the northern tier ports (New York, Boston, Albany and Portland) and undue prejudice to the southern tier ports (Philadelphia, Baltimore and Hampton Roads) in violation of Section 3(1) of the Interstate Commerce Act?

2. Whether the District Court erred in rejecting or ignoring the Commission's conclusion that approval of the proposed rates notwithstanding the distance and cost disadvantages of the railroads serving the northern tier ports, would require approval of corresponding rate reductions proposed by the railroads serving the southern tier ports to maintain the differentials at a lower rate level, thereby producing destructive competition and needless dissipation of carrier revenues?

3. Whether the District Court erred in finding that the railroads serving the northern tier ports had met their burden under Section 15(7) of establishing that their proposed rates would be just and reasonable, thereby assuming a primary function of the Commission?

STATEMENT

By filing tariffs to become effective July 10, 1956, and later dates, railroads which serve the North Atlantic ports of New York, Albany, Boston, and Portland, Maine (the northern tier ports) proposed to reduce rates on export and import traffic, except iron ore,[1] coal, and coke, between those ports and

[1] The differential rates on imported iron ore were and are the subject of separate Commission and court proceedings which are reported chronologically as: The initial decision of the Commission in *Iron Ore From Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527; February 5, 1954; second decision of the Commission in *Iron Ore From Eastern Ports to Central Freight Association Points*, 299 I.C.C. 195 dated October 1, 1956. This decision was challenged in a court proceeding entitled *Baltimore & Ohio Railroad Co.* v. *United States*, 151 F. Supp. 258 (1957), USDC D. of Md. From this decision an appeal was taken to the Supreme Court, 355 U.S. 175, 178. The matter was remanded to the Commission which reopened the proceeding on May 12, 1958. The final report of the Commission, designated as Report of the Commission on Second Further Hearing and Reconsideration, was entered on June 15, 1961, and published in 314 I.C.C. 149. In *New York Central R. Co., et al.* v. *United States*, 207 F. Supp. 483 (S.D.N.Y., 1962), that portion of the Commission's latest order which found unlawful reduced import rates on iron ore from New York to differential territory on the same level as Philadelphia and Baltimore was set aside. In *Baltimore & Ohio R. Co., et al.* v. *United States*, (D.C. Md.) decided December 19, 1962, there was set aside that portion of the Commission's order which found lawful

differential territory—which roughly is the area on and north of the Ohio River, west of the Buffalo-Pittsburgh line, and extending to the Mississippi River. The purpose of the proposal was to equalize, at the level of rates applying to and from Baltimore, the rates on such traffic moving to and from those ports with the rates on such traffic moving to and from Philadelphia, Baltimore and the Hampton Roads ports (the southern tier ports). The purpose of these proposed rate reductions was to eliminate the North Atlantic port differentials described above. Almost simultaneously, railroads serving the southern tier ports (e.g., Baltimore & Ohio R. Co.) filed tariffs proposing (if the northern lines' reduced rates were found lawful) to reduce their import and export rates from the southern tier ports to differential territory by the same amounts—so as to maintain the differentials but upon a lower level of rates. Pursuant to Section 15(7) of the Interstate Commerce Act (49 U.S.C. 15(7)), the Commission suspended both sets of proposed rates for the statutory suspension period of seven months, after which the railroads voluntarily postponed their effectiveness (R. 3739–3740).

Following extensive administrative proceedings, the Commission issued its report and order in Investigation and Suspension Docket No. 6615, *Equalization of Rates at North Atlantic Ports*, 311 I.C.C. 689 (R.

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import rates on iron ore from Philadelphia on the same level as Baltimore. The Commission has reopened the proceeding for still further hearings.

3738 et seq.), finding, among other things, that the proposed reduced rates to the northern tier ports "are not shown to be reasonably related to the present rates on like traffic between the same interior points and the southern tier ports, and that the proposed rates would result in undue preference of and advantage to the northern tier ports as a group and in undue prejudice and disadvantage to the southern tier ports (in violation of Section 3(1) of the Interstate Commerce Act) (R. 3806–3807). Treating the proposed rate reductions of the lines serving the southern tier ports as conditional counter proposals, the Commission found them "not shown to be just and reasonable."

On January 11, 1961, the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad Company filed a complaint in the United States District Court for Massachusetts attacking the Commission's order on the ground, *inter alia*, that the Commission erred in treating the proposed reduced rates to and from Boston, Portland, Albany and New York as a group, rather than separately and independently (R. 3823–3832). The United States filed an answer concurring in this objection (R. 3834–3835). Thereafter, the Commission reopened the proceeding for the purpose of reconsideration on the existing record "of the lawfulness of the proposed rates separately and independently on traffic to and from each of the northern tier ports" (R. 3835–3836). On June 15, 1961, the Commission issued its report on reconsideration (314 I.C.C. 185; R. 3836–3857) finding "that the

proposed rates to and from Albany, New York, Boston, and Portland, separately and collectively, are not shown to be reasonably related to the present rates on like traffic to and from the southern tier ports, and would cause undue preference of and advantage to the named ports and undue prejudice and disadvantage to the southern tier ports. In other respects, the prior findings are affirmed" (R. 3855).

Thereafter, amended pleadings were filed in the court below which, following briefs and arguments, on February 16, 1962, issued its opinion (R. 3994–4005) concluding "that the Commission's decision is erroneous in law and lacks the rational basis necessary to uphold it and it must be set aside." On February 23, 1962, the court entered its judgment (R. 4006) ordering that:

> The order of the Interstate Commerce Commission of December 5, 1960, insofar as it directs the cancellation of schedules proposing differential-eliminating rates to and from the Ports of Portland, Maine, Boston, Massachusetts, Albany and New York, New York, denies fourth-section application No. 32204, and prevents differential-eliminating rates from becoming effective, is set aside and the operation, enforcement and execution thereof is permanently enjoined.

SUMMARY OF ARGUMENT

I

In proposing reduced rates on export-import traffic moving through the northern tier ports, the appellee railroads are insisting the Commission is required to

enforce equalized rates on such traffic upon the railroads serving all of the North Atlantic ports. Thus, the case does not involve the question as to what rates might be voluntarily established by the railroads serving the various ports. The Commission found that such enforced equalization would cause an undue diversion of traffic from the sothern tier ports to New York, and would deny to those ports and the railroads serving them any benefits from their advantages of distance and cost. The Commission concluded that such enforced equalization of rates would result in undue preference and prejudice between the northern tier and southern tier ports, in violation of Section 3(1), of the Interstate Commerce Act.

A. The District Court, in setting aside the Commission's finding under Section 3(1), erred in concluding that the sole function of the differentials was to offset different ocean rates and that no consideration was ever given to disparity of rail distances in the establishment and maintenance of the differentials. To the contrary, a review of the history of the rail rate differentials, as reflected in prior Commission decisions, clearly reveals that they were rarely if ever tailored to offsetting ocean freight differentials and, indeed, that the existence and amount of the latter was often in dispute. It further shows that the distance advantages of the southern tier ports have been repeatedly asserted and considered in both the maintenance and modification of the differentials.

B. The court below erred in concluding that the 1935 amendment to Section 3(1), which added "ports"

to the entities to be protected from undue preference and prejudice, was intended "to permit all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports." The 1935 amendment followed this Court's decision in *Texas & Pacific Ry. Co.* v. *United States,* 289 U.S. 627 (1933) that "locality" as used in Section 3(1) did not include "ports". The 1935 amendment was widely supported by port interests urging the need for a forum for the determination of just such issues as are presented in this case. The Senate's defeat of the Long amendment, which would have provided that "Where rates and charges of common carriers to ports are made as reductions to equalize rates to ports served by competing carriers, it shall not be termed undue preference or discrimination," amounts to a rejection of the view of the appellees and the court below as to the effect of the 1935 amendment. The Congress fully understood that the rejection of the Long amendment meant that the Commission would be empowered to take into account relative distances and other transportation factors in determining such matters.

Since 1935, both the Commission and the lower Federal courts have recognized that in determining issues of undue preference and prejudice between ports, the Commission is not required to ignore the transportation advantages of particular ports and the carriers serving them.

C. The Commission's conclusion that the enforced rate equalization proposed by the appellees would violate Section 3(1) is supported by detailed findings as

the present distribution of export-import traffic among the ports, the effect of equalization in diverting traffic from the southern tier ports to New York, and the distance and cost advantages of the southern tier ports and carriers. The appellees failed to adduce evidence from which the Commission could determine whether, with the asserted disappearance of the ocean freight differentials in 1935, the rail differentials caused a diversion of traffic from the northern ports. Contrary to the decision below, the Commission may determine issues of undue preference and prejudice violative of Section 3(1) in a proceeding under Section 15(7) in which the burden of proof was on the appellees as proponents of the rate change.

II

Even if the court below had been correct in holding that Section 3(1) issues may not be determined in a proceeding under Section 15(7), it was in error in failing to sustain the Commission's action as necessary to prevent unnecessary dissipation of carrier revenues. The freedom asserted by the appellees to reduce their rates for competitive purposes must also be accorded to the railroads serving the southern tier ports, so as to enable them to use their distance and cost advantages in an offsetting rate reduction. Since no one proposed that the differentials be continued at a lower rate level, it was an appropriate use of the Commission's minimum rate powers to prevent such a dissipation of carrier revenues. *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573 (1949).

III

Based upon its own evaluation of limited cost evidence and revenue comparisons of little probative value, the court below concluded that "the [appellee railroads] certainly established *prima facie* that the proposed rate schedule is just and reasonable." The court clearly erred in assuming the Commission's primary responsibility for determining whether proposed rates are reasonably compensatory." *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481 (1934).

ARGUMENT

I

THE COMMISSION WAS WARRANTED IN FINDING THAT ENFORCED EQUALIZATION OF RAIL RATES ON EXPORT-IMPORT TRAFFIC BETWEEN THE NORTH ATLANTIC PORTS AND DIFFERENTIAL TERRITORY WOULD RESULT IN UNDUE PREFERENCE AND PREJUDICE BETWEEN PORTS, IN VIOLATION OF SECTION 3(1) OF THE INTERSTATE COMMERCE ACT

In this portion of our brief, we will (1) summarize the history of the North Atlantic port differentials insofar as it bears upon certain important conclusions in the opinion below, (2) show that Section 3(1), as amended in 1935 was intended to empower the Commission to deal with undue preference and prejudice between ports as it did here, and (3) point to the salient findings and evidence which support the Commission's finding that the enforced rate equalization proposed by the appellees would violate Section 3(1).

It is clear that a major element in the lower court's rejection of the Commission's finding that the appellee's proposed rate reductions (looking to enforced equalization of rates), would violate Section 3(1) was its conclusion (R. 4003) that:

> In the first place, the differential was established to place all North Atlantic ports on a parity with respect to the aggregate of rail and ocean charges. No consideration whatever was given to disparity in rail distances then or later. * * *

We will not attempt to review here all of the historical and legal materials relating to this rate adjustment which are summarized in the appendix to the brief of the appellants in No. 98. However, we will utilize some of these materials to demonstrate, contrary to the opinion below, that the inland rate differentials have rarely if ever coincided with the differences in ocean freight rates between Europe and the various North Atlantic ports, and that the distance advantages of the southern tier ports and the railroads serving them have never been wholly ignored.

The North Atlantic port differentials on export and import traffic arose out of the rate wars between the railroads serving the North Atlantic ports after they had extended their lines to Chicago and the middle West. Primarily these railroads were New York Central, Erie, Pennsylvania, and Baltimore & Ohio, serving the North Atlantic ports of Boston, New York, Philadelphia, and Baltimore. The early history of the differentials is summarized in *New York*

Produce Exchange v. *Baltimore & Ohio R. Co.*, 7 I.C.C. 612, 617-618 (1898) as follows:

* * * The earliest agreed differential of which the testimony gives any account was that of 1869, by which Baltimore enjoyed an advantage of 10 cents per hundred pounds over New York. It does not appear what the differential in favor of Philadelphia was. In 1870 a war of rates occurred, with the result that the Baltimore differential was reduced to 5 cents per hundred pounds on grain and the lower classes of freight, while upon the higher classes of freight the differential was 10 cents per hundred pounds, and these differentials seem to have continued until about 1876. It does not appear what the differential of Philadelphia upon east-bound traffic was, but a tariff of November, 1875, gives the differentials upon west-bound traffic as follows:

	First Class.	Second Class.	Third Class.	Fourth Class.	Special Class.
Baltimore	10 cts.	9 cts.	8 cts.	6 cts.	5 cts.
Philadelphia	7 cts.	7 cts.	6 cts.	4 cts.	3 cts.

In March, 1876, this system of an arbitrary differential was abandoned and the lines agreed upon a system of percentage differentials based upon the relative distances from western cities to Baltimore, Philadelphia, and New York, respectively, taking New York as the basis. Under this agreement the rate from Chicago to Baltimore was 13 percent and to Philadelphia 10 percent less than to New York, and from Cincinnati to Baltimore 24 percent, and to Philadelphia 12 percent less than to New York.

After a few weeks' experience, the New York Central and the Erie withdrew from this

agreement upon the assertion that it was too favorable to Baltimore and Philadelphia. Thereupon another rate war ensued, which terminated in an agreement of April 5, 1877, by which fixed differences in rate were re-established in place of differences based upon relative distances. Under this agreement east-bound differentials from western points were 3 cents to Baltimore and 2 cents to Philadelphia upon all classes. On west-bound traffic the differentials in favor of Baltimore and Philadelphia differed with different classes, and were as follows:

From	First Class.	Second Class.	Third Class.	Fourth Class.
Baltimore	8 cts.	8 cts.	3 cts.	3 cts.
From Philadelphia	6 cts.	6 cts.	2 cts.	2 cts.

The agreement of April 5, 1877 (R. 1903–1904), referred to in the above quotation, recited that it was

> To avoid all future misunderstandings in respect to the geographical advantages or disadvantages of the Cities of Baltimore, Philadelphia and New York, as affected by rail-and-ocean transportation, and with the view of effecting an equalization of the aggregate cost of rail and ocean transportation between all competitive points in the West, Northwest and Southwest, and all domestic or foreign ports reached through the above cities, * * *

The agreement further provided that the rates to Boston should at no time be less than those to New York on domestic or foreign freights.

However, the agreement of 1877 was far from settling the controversy (7 I.C.C. 618–619)

> The agreement provided that, upon the giving of certain notice, any party to it might withdraw, and in June, 1880, the New York Central gave notice of withdrawal, stating that the differentials were originally based upon supposed differences in ocean rates, that such differences no longer existed, that therefore the reasons for the differentials had ceased to exist and that the differentials themselves should also cease. The Pennsylvania and the Baltimore and Ohio insisted upon the differentials, and the action of the New York Central apparently led to another rate war, which terminated in the latter part of 1881 by a restoration of the differentials of April 5, 1877.

Thereupon, the subject of differential rates was referred to Albert Fink, commissioner of the Trunk Lines, who submitted a report on December 1, 1881.[2] Nor did the Fink report settle much. For in 1882, the principal railroads serving the ports asked Messrs. Thurman, Cooley and Washburn to act as an advisory commission upon the "differences in rates that should exist, both Eastwardly and Westwardly, upon all classes of freights between the several terminal Atlantic ports." The Advisory Commission[3] concluded that the then existing differentials should not be disturbed (R. 1627-1667).

Thus, at the very beginning of the history of this rate adjustment, the distance advantages of the southern tier ports and railroads were asserted and

[2] The Fink report is reproduced in Daish, *The Atlantic Port Differentials* (1918), pp. 9 et seq.

[3] Its report also appears in *Daish, ibid.*, at pp. 71 et seq.

taken into account, and there was dispute as to their relationship to the ocean freight rates.

New York Produce Exchange v. *Baltimore & Ohio R. Co.*, 7 I.C.C. 612 (1898), arose out of a complaint filed by a group of New York merchants alleging that the port differentials unduly preferred Boston, Philadelphia, Baltimore, Newport News and Norfolk over New York, in violation of Section 3(1) of the Act. A major contention was that while the agreement of 1877 contemplated that the differentials would offset higher ocean freight rates from Philadelphia (so as to equalize the through charge from inland points to European markets), "at the present time ocean freights are substantially the same from all of the ports" (7 I.C.C. at 623–624). The Commission found that "so far as the full cargo business is concerned, there is no appreciable distance in cost, and no appreciable distance in the ocean rate from the three ports, New York, Baltimore and Philadelphia" (*id.*, p. 626). As to grain carried at berth rates,[1] the Commission found that there was a difference in favor of New York over Philadelphia "which amounts, perhaps, to from 1½ to 2 cents per hundred pounds; and that about the same difference exists against Baltimore" (*id.* p. 630). In a long report (which dismissed the complaint without prejudice), the Commission discussed the distance factor as follows:

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[1] "Merchandise is said to be carried at berth rates when it does not constitute the entire freight cargo of the vessel, but only a portion of it" (7 I.C.C. at p. 626).

> Distance is frequently disregarded by carriers in the making of their rates. The Commission has held that it may be under some circumstances properly disregarded to some extent. It has been repeatedly said, however, that distance ought, when possible, to be regarded, and we have never held that a carrier would be compelled to disregard it for the purpose of putting two communities upon a commercial equality.
>
> * * * * *
>
> The defendants do not justify these differentials upon the ground either of distance or cost of service. We do not express an opinion that they could be justified to their full extent upon either of these grounds. They certainly could not in the case of Norfolk and Newport News. But we do think that in this inquiry between the three localities, New York, Philadelphia and Baltimore, in determining whether there is an undue preference, the advantage which Philadelphia and Baltimore possess in the way of distance should be considered, and that the same is true of the additional expense of delivery at New York. (*id.* pp. 667, 669)

In the Matter of Differential Rates, 11 I.C.C. 13 (1905), arose out of a petition by the commercial organizations of Boston, New York, Philadelphia, and Baltimore that the Commission "examine the whole subject of differential rates to and from these four cities and determine whether the present differentials should be abolished, or, if retained, modified" (*id.* at p. 15). In finding, in its role as arbiter, that the

differentials generally were fair, the Commission made the following points, *inter alia*:

> Both Mr. Fink and the Advisory Commission found that ocean rates were higher from Baltimore and Philadelphia than from New York and attached much importance to this fact, but a careful reading of these reports apparently shows that in the opinion of their authors difference in ocean rates was not the only factor which should be considered, partly for the reason that it was impossible to determine exactly what the ocean rate was, and partly because the thing to be equalized was not the rate but the advantages of transportation through the several ports. (*id.* p. 18)
>
> * * * * * * *
>
> While, however, it would be impossible to secure by the application of any inland differential the same rate through all the ports it would be possible to say with confidence that if this were the proper basis of making the differential the present differentials are too high, for they undoubtedly exceed the difference in the ocean rates. In our opinion they always have from the very first. While the Truman Commission reported that rates from Philadelphia and Baltimore were higher than from New York by an amount substantially equaling the differentials, Mr. Fink, a much closer observer, with much better means of information, stated in his report of 1881 that the difference in ocean rates was only about one-half the differential from Philadelphia, and something more than one cent less than the differential from Baltimore. This Commission

found upon the former hearings that the difference in ocean rates did not equal the differentials. We have now expressed the belief in our findings of fact that for the last seven years the difference in ocean rates has been materially less than the differentials. * * * (*id.* pp. 67–68)

In 1910, following the outbreak of a rate war between railroads serving the North Atlantic ports on import traffic destined to differential territory, the railroads serving the ports of Boston, New York, Philadelphia, and Baltimore and the commercial bodies of Boston, Philadelphia, and Baltimore requested the Commission "to decide or advise as to the adjustment of the inland import rates from the several ports." This request for arbitration was followed by the filing by associations of New York merchants of complaints charging, with respect to import and export traffic having its origin or destination in differential territory, that higher rates to and from New York than were charged to and from Boston, Philadelphia, and Baltimore, were unjustly discriminatory against New York and unduly preferential to Boston, Philadelphia, and Baltimore, in violation of Section 3(1). The Boston interests intervened to urge that the rates to and from Boston, Philadelphia, and Baltimore should be equalized at the Baltimore level, i.e., below the New York rates. The Commission found nothing unlawful in the then existing differentials, but prescribed some modifications, e.g., that the import rates from Boston should be not lower than from New York. In its main report in the complaint case, *Chamber of*

Commerce of N. Y. v. New York Central & Hudson R. R. Co., 24 I.C.C. 55 (1912), the Commission, while stating that "in so far as the differential adjustment is observed, distance is largely disregarded" (*id.* p. 66) apparently found it unnecessary to come to grips with the contention "that the rail haul to or from Baltimore or Philadelphia is shorter than to or from New York, and that therefore lower rates to and from Philadelphia or Baltimore than to and from New York are fully justified" (*id.* 57). Thus, treating the complaint primarily as one brought by port and shipper interests against railroads who were voluntarily maintaining the differentials, the Commission stated (at p. 75) that:

> The Baltimore & Ohio and the Pennsylvania systems, reaching by their own lines so many of the important commercial centers in the middle west and so many of the lake ports and having their own boats on the lakes and hauling all of their New York traffic through either Philadelphia or Baltimore or both, control the rate situation between the territory here considered and Baltimore and Philadelphia. The competitive conditions at Baltimore and Philadelphia are created by these systems, and the rate situation to and from those ports is controlled by them. It was this control by these systems that led to the making of the differential agreement. We do not recognize such an agreement as lawful, but the conditions which brought it about are as strong to-day as they ever were and we find now, as we found in the *North Atlantic Ports case*, *supra*, that

> the Pennsylvania and the Baltimore & Ohio have the lawful right to maintain lower rates to and from Baltimore and Philadelphia than they contemporaneously maintain to and from New York. They would probably also have the right to make these rates the same to and from all of those ports if they chose to do so.

It should be noted that in this case, too, the Commission had difficulty in ascertaining whether and to what extent the rail differentials were in fact serving the purpose of offsetting ocean freight rate differentials between the ports (*id.* pp. 69–74).

Maritime Assoc. of Boston Chamber of Commerce v. Ann Arbor R. Co., et al., 95 I.C.C. 539 (1925) involved another attack by Boston and New England interests upon the North Atlantic port differentials as unduly prejudicial to Boston in violation of Section 3(1). In finding that the assailed rates were not unduly prejudicial to the New England ports or unduly preferential of the other ports (*id.* p. 574), the Commission made the following statements:

> Complainants do not contend that the rates attacked are inherently unreasonable; the issue is one of relationship. Although they ask for Boston and the other New England ports rates not exceeding those applicable between differential territory and the various ports named, what they in reality desire is that all differences in the import and export rates shall be abolished. They want equalization of rates, and it is immaterial to them how that equalization is accomplished. * * * (*id.* pp. 541–542)

* * * * *

After careful consideration of the present record and of the conclusions reached in prior decisions with reference to this matter,* [Footnote omitted] we are of the opinion that for many years prior to the World War there was a generally prevailing policy, except with respect to full cargo rates on grain, which were of minor importance, to offset the inland rail differentials in whole or in part by differences in the ocean rates to and from the North Atlantic ports. On the other hand it appears that, since the World War at least, it has been and is now the generally prevailing policy to equalize these ocean rates. * * * (*id.* p. 554)

* * * * *

In passing upon the reasonableness of rates or in determining whether or not undue prejudice and preference exist, it is well settled that cost of service is a factor which must be taken into consideration. There are other factors which have weight, but cost of service is one of the most important. Certainly we are not warranted, in our determination of these matters, in disregarding differences in distances which are substantial and material when compared with the total hauls involved. It is true that there are many instances in the rate structure where distance seems to have been given little or no consideration and that rates are often blanketed over great areas. But these situations are either the product of common consent, so that they are not subjected to the tests of the law, or they result from competitive influences. (*id.* p. 565)

* * * * *

> In the present proceeding there is no evidence that the rates under attack are either unreasonably high or unreasonably low. The real issue is whether undue preference and prejudice exist. In view of the very substantial advantages in distance from differential territory which Philadelphia and Baltimore enjoy, as compared with New York and Boston, and as compared with the total hauls, we are unable to find that there is anything unlawful about the port differentials in favor of Philadelphia and Baltimore. Compared with the advantages in distance the present differentials in many cases are relatively small. * * * (*id.* pp. 567–568)

Baltimore Chamber of Commerce v. *Ann Arbor R. Co., et al.*, 159 I.C.C. 691 (1929) involved the complaint of Baltimore that the differentials, Baltimore under New York, on export and import traffic to differential territory were "too low to reflect the advantages of Baltimore either as to line haul service or as to terminal costs, and that, therefore, the export and import rates between Baltimore and differential territory are unreasonable and unduly prejudicial to Baltimore and unduly preferential of New York" (*id.* p. 692). In rejecting Baltimore's request that the differential in its favor be increased, the majority of the Commission apparently held that differences in distance and terminal expenses were not "determinative of the proper measure of the differentials" (*id.* p. 696). In his separate dissenting opinion, Commissioner Eastman, in concluding that "the existing differentials, Baltimore under New York, are fully justi-

fied by differences in the rail service alone to and from these ports," and that the higher terminal costs at New York would justify increased differentials, stated that the intent of Section 3(1) "is to forbid a carrier from charging one locality relatively and substantially more for the transportation service furnished than it charges another and competing community" (*id.* pp. 704, 705).

In *Albany Port District Commission* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151 (1936), the Commission found that the structure of import and export rates was unduly prejudicial to Albany and unduly preferential of other North Atlantic ports, and held that import and export rates between differential territory and Albany should be the same as to Philadelphia. In so holding, the Commission pointed out that (*id.* p. 165).

> * * * The average distances from the ports to all key points in central territory are, to New York 804 miles, to Philadelphia 746 miles, to Albany 737 miles, and to Baltimore 692 miles. The average distances from Albany and from Philadelphia are almost the same. We conclude that maximum reasonable port rates between the port of Albany and points in central territory will be rates the same in amount as the port rates concurrently applicable between the port of Philadelphia and the same points, subject to Albany's corresponding domestic rates as maxima.

While the Commission stated that the distance factor was not controlling, distance was obviously an im-

portant consideration in arriving the particular result.

The foregoing discussion of some of the principal prior decisions of the Commission with respect to the North Atlantic port differentials, while not exhaustive, illustrates the historical complexity of the problem. Specifically this history shows (1) that during much of this period since 1877 the rail differentials were not in fact measured by the differences in ocean freight rates at the North Atlantic ports, and (2) that in determining the lawfulness of the rail differentials, it has been impossible to ignore the factor of relative distance (and cost) and the Commission has repeatedly taken it into account.

B. THE LANGUAGE AND HISTORY OF THE PROHIBITION IN SECTION 3(1) OF UNDUE PREFERENCE AND PREJUDICE BETWEEN PORTS INDICATE THAT CONGRESS DID NOT INTEND TO REQUIRE THE COMMISSION TO ENFORCE RATE PARITY ON EXPORT-IMPORT TRAFFIC MOVING THROUGH DIFFERENT PORTS IN TOTAL DISREGARD OF THE TRANSPORTATION ADVANTAGES OF PARTICULAR PORTS

In setting aside the Commission's order in this case, the decision below has mistaken the purpose and history of Section 3(1), insofar as it prohibits undue preference and prejudice between ports. It apparently holds, we contend erroneously, that as a matter of law differences in distance to the port cannot justify differential rates (R. 4003). Again, it erred in concluding that "one of the purposes of the 1935 amendment to Section 3 was * * * to permit all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports" (R. 4004). This conclusion apparently lead the court below to "find that

the Commission erred in applying Section 3(1) too narrowly and in not giving due weight to the interests of shippers, receivers, carriers, and inland communities" (R. 4003). Even if, contrary to our contention, the court below was correct as to the state of law prior to 1935, it was clearly in error as to the purpose of the 1935 amendment to Section 3(1) which is now controlling.

Prior to 1935, Section 3(1) provided that

> It shall be unlawful for any common carrier * * * to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The words "port, port district, gateway, transit point", which now appear in Section 3(1) after "locality", were added by a 1935 amendment (49 Stat. 607). This 1935 amendment was the aftermath to the decision of this Court in *Texas & Pacific Ry. Co. v. United States*, 289 U.S. 627 (1933), holding that "locality" as used in Section 3(1) did not include "ports". That case arose out of the Commission's decision in *Galveston Commercial Association v. Galveston, H. & S.A. Ry. Co., et al.*, 100 I.C.C. 110 (1925); 128 I.C.C. 349 (1927), in which the Commission found that the maintenance of same import and

export rates to and from New Orleans and Galveston and a defined inland territory, notwithstanding the distance advantages of Galveston, was unduly prejudicial to Galveston and unduly preferential to New Orleans.[a] The Commission further found that the undue prejudice should be remanded by the establishment of specific differentials, Galveston under New Orleans, where the differences in distance in favor of Galveston were greater than 100 miles. In its report on further hearing (128 I.C.C. 349), the Commission affirmed its finding of undue preference and prejudice under Section 3(1), but prescribed specific differentials where the short-line distances to New Orleans exceeded those to Galveston by more than 25%. In so doing, the Commission stated (128 I.C.C. 387-388) that

> where it is shown that extensive grouping or port equalization, voluntarily maintained by the same carriers, without justification by competition, has disregarded substantial differences in distance and has resulted in substantial injury to shippers or localities, we have found such grouping or port equalization to be unlawful, and in the latter class of cases have prescribed reasonable rate differences. * * *

In the *Texas & Pacific* case, this Court, with Chief Justice Hughes and Justices Stone, Brandeis and Cardozo dissenting, held that "ports as such are not localities with respect to export and import traffic routed through them, susceptible of undue perference

[a] The Commission found that the same ocean rates applied to all of the Gulf ports.

or prejudice within the intent of the Act" (289 U.S. at 644). In so holding, the majority of this Court stated (*id.* at 639-640) that

> The legislative history of the Act demonstrates that Congress did not intend to forbid the equalization of export or import rates by lines serving several ports in order to meet competition. These rates, it was said, were not to be proportioned to the respective distances between inland origins or destinations and the ports." [Footnote omitted] Both equalizations and differentials had for some time been maintained in the rates to various Atlantic ports. Congress was aware of this, and had no intention of interfering with the maintenance of these rate adjustments.

This and other language in the Court's opinion strongly suggests that its holding that a "port" is not a "locality" was based upon the view that Congress intended to allow railroads to compete for export and import traffic wholly without regard for the effect of such competition upon particular ports.

Justice Stone's long dissenting opinion made the following points, *inter alia:*

> In holding that the Commission is without power to make the order, the Court does not deny that a discrimination which is produced by charging equal rates for unequal service is prohibited by the statute as much as one resulting from unequal rates for equal service. * * * [*id.* at 656]

* * * * *

* * * A rate structure which diverts from one port to another a portion of the ocean-borne traffic, which would otherwise naturally pass through the former, sufficient to destroy the business of banks, marine insurance companies, freight forwarders, freight and ship brokers, stevedores, tonnage companies, pilots, dry-docks, ship supply and bunker coal merchants, customs brokers, export and import commission houses, centered there, would seem to have an effect upon the commerce and general welfare of the country of precisely the kind which the act was intended to prohibit and the Commission empowered to prevent. So the Commission has concluded in a series of cases dealing with discrimination against ports, going back to the first years of its existence. * * * [*id.* at 659].

* * * * *

The port differentials and equalizations maintained prior to the passage of the original act, in order to secure a fair distribution of traffic among the Atlantic ports and the carriers serving them, were very different in quality and prejudicial effect upon the localities concerned from the rate structure resulting in the discrimination disclosed here.* [Footnote omitted] The existence of those equalizations before 1887 and the fact that in some instances since that date they have been regarded as innocuous even by the Commission itself, can hardly lend support to the supposition that the statute was not intended to forbid destructive discriminations in that form as well as in any other. The argument seems to be that the statute cannot be deemed to forbid

unjust discriminations against ports since if it did all rates to competing ports not measured by mileage or carrier service would be forbidden whether unjust or not. With equal plausibility it was argued that because competition between carriers was an established practice before the enactment of § 3 and is not forbidden by the Act, no discrimination induced by carrier competition was forbidden. But that construction was rejected by this Court, *Wight* v. *United States*, 167 U.S. 512, 517; *United States* v. *Illinois Central R. Co., supra; Merchants Warehouse Co.* v. *United States, supra*, for the same reason that the present construction should be rejected—that although carrier competition was not destroyed by the Interstate Commerce Act, it was limited by the prohibition of § 3 of those discriminations which, in the light of all the circumstances, are found to be undue or unreasonable. [*id.* at 660–661].

* * * * * *

* * * The statute does not command or the Commission's order direct that the rates shall be measured exclusively by mileage or carrier service; carrier competition for business passing through gateways or elsewhere is not forbidden; but when the discrimination goes so far beyond the line of reasonableness as to result in the commercial destruction of a locality, the Commission may declare it "undue or unreasonable" and, therefore, forbidden by the statute, whether aimed at ports or points of shipment or destination. Nothing that this Court has ever said is inconsistent with this conclusion. The legislative history of the

statute seems to support, rather than to deny it. [*id.* at 622-663].

As we have noted above, the *Texas & Pacific* decision led to the 1935 amendment which added "port, port districts" etc. to the entities to be protected from undue preference and prejudice under Section 3(1). *Of course, the mere insertion of "port", without more, indicates that ports were to be protected from undue preference and prejudice—even though this meant some restriction upon the freedom of carriers to compete for traffic.* But there is a great deal more in the legislative history of the 1935 amendment.

The 1934 report of the Federal Coordinator of Transportation (Eastman) Sen. Doc. No. 152, 73rd Cong., 2d Sess. (1934) p. 95, after referring to this Court's *Texas & Pacific* decision, contains the following statement:

> In the dissenting opinion by Justice Stone, in which three other members of the court concurred, it was pointed out (page 659) that the "commercial interests of a port, always of great magnitude, may suffer the same destruction from discriminatory rates as do shippers or other industrial interests at points of origin or destination." This is obviously true; and if section 3 is not so worded that undue preference of or prejudice to ports is prohibited, plainly it should be amended to cure this deficiency. Many cases of discrimination as between ports have been considered by the Commission in the past, and no question as to the jurisdiction under section 3 over such cases

was raised prior to the above decision of the Supreme Court.

The Coordinator's recommendation for remedial legislation was endorsed by the Commission (*id.* p. v.). Thereafter, bills were introduced in the second session of the 73rd Congress (1934) and the first session of the 74th Congress (1935). In the 73rd Congress, a subcommittee of the Senate Committee on Interstate Commerce held hearings on S. 2477; in the 74th Congress, the same subcommittee held hearings on S. 874 and similar bills, while a subcommittee of the House Committee on Interstate and Foreign Commerce held hearings on H.R. 3006 and other bills to amend Section 3(1).

At all three hearings, representatives of many ports urged that Section 3(1) be amended to include ports so as to give the Commission jurisdiction to entertain and determine complaints of undue preference and prejudice between ports. For the most part, there was little discussion of the specific principles to be applied by the Commission in determining such issues. However, representatives of the New Orleans interests, which had been participants in the New Orleans vs. Galveston situation involved in the *Texas & Pacific* case, testified in opposition to any such amendment unless it included a provision to the effect, for example, that "Nothing herein contained shall be held to prevent carriers from equalizing, in whole or in part, to meet carrier competition, the rates on export, import, or coastwise traffic between interior points and the ports, where such rates do not impose an unjust bur-

den on other traffic." Senate 1934 hearings on S. 2477, pp. 175–178, 198; Senate 1935 hearings on S. 874, pp. 80, 84; House 1935 hearings on H.R. 3006, etc., p. 40. Significantly, Joseph B. Eastman, the Federal Coordinator of Transportation, in a colloquy with Senator Huey Long of Louisiana, put the issue in these simple terms:

> "I have always thought that a port or any other locality is entitled to the benefit of its natural geographic advantages, and that we did not attempt to give any advantage in rates to Galveston, except where the distances favored it by very substantial proportions" (Senate 1935 hearings, p. 7).

Notwithstanding the clarity with which the basic issue was presented, both by the amendments urged by the New Orleans interests and by Commissioner Eastman's candid statement, none of these amendments were adopted by either the Senate or House Commerce Committees in the bills which they reported to their respective Houses.

The bill was reported first by the Senate Committee on Interstate Commerce on May 13, 1935 (Sen. Rep. 885, 74th Cong., 1st Sess., pp. 1–2) which characterized the 1935 amendment as follows:

> The purpose of the bill S. 1633 and of S. 874 and S. 1813, is to restore to the Interstate Commerce Commission the power to remove undue preference or prejudice against ports which it had exercised for many years prior to the five-to-four decision of the Supreme Court in *Texas & Pacific Ry. Co. et al.* v. *United States* (289 U.S. 627, May 29, 1933), holding that the

word "locality" in paragraph (1) of section 3, did not include a "port" with respect to export and import traffic routed through such a port. The majority opinion of the Court held that the word "locality" referred to "points of origin or destination.". The minority opinion of Mr. Justice Stone, concurred in by three other justices, pointed out that the "commercial interests of a port, always of great magnitude, may suffer the same destruction from discriminatory rates as do shippers or other industrial interests at points of origin or destination." (See p. 28 of subcommittee hearings.)

At the hearings held on these bills on March 26 to 28, 1935, the bill (S. 1633) introduced by Senator Wheeler at the request of Coordinator Eastman and the Interstate Commerce Commission, was supported by witnesses representing the ports of Massachusetts, New York, New Jersey, Pennsylvania, Maryland, Virginia, Texas, and Oregon.

Representatives of the shippers also favored the bills which were opposed only by representatives of the port of New Orleans, of the Texas interior points of origin, and the two railroads which were involved in the Supreme Court decision. * * *

Paragraph (1) of section 3 of the act was enacted as section 3 of the original act to regulate commerce, February 4, 1887, and its language had remained unchanged throughout the intervening years. Until 1929 no doubt was ever entertained that the word "locality" was broad enough to include any place, including a port and the commission heard and decided many cases involving ports under that language. In

> 1929 the Commission determined a controversy between the ports of New Orleans and Galveston partially in favor of Galveston, which had complained that certain railroad rates on export traffic denied it the advantage of its closer distance to Texas origins and discriminated against it in favor of New Orleans, which was farther away from these points. That case was carried to the Supreme Court and resulted in the May 1933 decision limiting the meaning of the word "locality" to points of origin or destination. * * *

S. 1633 was debated extensively in the Senate. 79 Cong. Rec. 10595 et seq. There was extensive discussion of the issue underlying *Texas & Pacific, i.e.*, whether the Commission could prescribe differential rates between competing ports which gave some weight to the distance advantages of one port over the other. See, for example, 79 Cong. Rec. 10602, where Senator Long of Louisiana was attacking the concept that some weight be given to distance in the Galveston-New Orleans situation, and *id.* 10605–10606, where Senator Tydings of Maryland defended the view that distance was a factor to be considered.

Senator Long proposed the following amendment (79 Cong. Rec. 10596):

> Where rates and charges of common carriers to ports are made as reductions to equalize rates to ports served by competing carriers, it shall not be termed undue preference or discrimination.

The Long amendment was debated extensively (79 Cong. Rec. 10608-10619). The effect of the amendment was characterized immediately as follows (*id.* 10610):

> Mr. SMITH. The object is to prevent further discrimination against ports where they are more advantageously situated by virtue of their nearness to the source of supply. If this amendment should be agreed to, we might just as well tear up the remainder of the bill——
>
> Mr. TYDINGS. That is the way it appears to me.
>
> Mr. SMITH. For the reason that any road which is farther away can reduce its rates to the given port in order to compete with those roads which are nearer to the port. Just strike out all the remainder of the bill and adopt this amendment, and we will have exactly the condition we now have.

Finally, Senator Long, in defending his amendment, touched upon an underlying issue in this case, as follows (*id.* 10618):

> The Senator from Maryland [Mr. Tydings] is absent now. Nonetheless, I have to answer some of the statements he makes. In speaking of the amendment, he says, "Suppose one railroad reduces its rate, and then the other railroad reduces its rate below the first reduction?"
>
> Such a thing is not contemplated by the amendment, Mr. President. I am sorry the Senator has gone. The amendment provides that the railroad line can reduce the rate to a point of equality, but there is nothing which permits the other railroad to reduce its rate

> below that equality without the consent of the Interstate Commerce Commission. * * *

The Long amendment was defeated in the Senate by a vote of 49 to 23 (*id.* 10619). The entire Senate debate makes clear that its action amounted to a rejection, with full knowledge of what was involved, of the appellees' basic position.

Following the passage of S. 1633 by the Senate, that bill was reported favorably by the House Committee on Interstate and Foreign Commerce (H. Rep. 1512, 74th Cong., 1st Sess. (1935) pp. 1–3), which described the effect of the proposed amendment as follows:

> The purpose of the bill S. 1633 is to restore to the Interstate Commerce Commission the power to remove undue preference or prejudice against ports which it had exercised for many years prior to the five-to-four decision of the Supreme Court in *Texas & Pacific Ry. Co. et al.* v. *United States* (289 U.S. 627, May 29, 1933), holding that the word "locality" in paragraph (1) of section 3, did not include a "port" with respect to export and import traffic routed through such a port. The majority opinion of the Court held that the word "locality" referred to "points of origin or destination." The minority opinion of Mr. Justice Stone, concurred in by three other justices, pointed out that the "commercial interests of a port, always of great magnitude, may suffer the same destruction from discriminatory rates as do shippers or other industrial interests at points of origin or destination."

At the hearings held before a subcommittee of the Committee on Interstate and Foreign Commerce of the House on June 12 and June 18, 1935, and before a subcommittee of the Interstate Commerce Committee of the Senate on March 26 to 28, 1935, witnesses representing the ports of New York, Massachusetts, New Jersey, Pennsylvania, Maryland, Virginia, California, Oregon, Texas, and other States, appeared in support of the bills H.R. 5361 and S. 1633, introduced, respectively, by Representative Rayburn and Senator Wheeler upon request of Federal Coordinator Eastman.

Representatives of the shippers also favored the bills which were opposed only by representatives of the port of New Orleans, of the Texas interior points of origin, and the two railroads which were involved in the Supreme Court decision. * * *

Paragraph (1) of section 3 of the act was enacted as section 3 of the original act to regulate commerce, February 4, 1887, and its language has remained unchanged throughout the intervening years. Until 1929 no doubt was ever entertained that the word "locality" was broad enough to include any place, including a port, and the Commission heard and decided many cases involving ports under that language.

In 1929 the Commission determined a controversy between the ports of New Orleans and Galveston partially in favor of Galveston, which had complained that certain railroad rates on export traffic denied it the advantage of its closer distance to Texas origins and discriminated against it in favor of New Orleans,

which was farther away from these points. That case was carried to the Supreme Court and resulted in the May 1933 decision limiting the meaning of the word "locality" to points of origin or destination. Thereafter the Seventy-third Congress and this Congress have had a number of bills introduced to correct the situation by amending the paragraph in question so as to restore to the ports a right to complain of rail rates through the ports and to permit the Commission to entertain and decide such complaints.

The same considerations requiring such relief of the ports motivates the granting of similar relief to port districts, gateways, and transit points which otherwise could be discriminated against by the rail rates on traffic through them, without opportunity to complain.

In recommending that this bill be passed, the committee does so with the idea in mind that by amending section 3 of the Interstate Commerce Act as thus contemplated it will encourage and promote the freedom of movement of export, import, and coastwise commerce through the ports of the country. The committee considers that it is to the interest of the public that such commerce be permitted to move freely through as many available ports as the governing circumstances will reasonably permit, and that no restrictions upon and impediments to the free movement thereof should be imposed that are not clearly shown to be sound or economically justified. The recommendation of the committee that this bill be enacted is intended to afford competing ports a forum in which to complain of rate adjustments which

> tend to concentrate the movement of the traffic through one port or a limited number of ports and to deprive other ports of an opportunity to handle a part of such traffic. The committee believes that such a diffusion of the traffic which moves through the ports will redound to the benefit of the producer and consumer in the interior by whom in the last analysis the transportation charges levied both for the transportation thereof and for the use of the facilities at the ports are ultimately borne.

The House debate was perfunctory, in contrast with the bitter and dramatic Senate debate.

Clearly, therefor, the purpose of the 1935 amendment to Section 3(1) is to be found in (a) the net result of the Senate and House Committee hearings discussed above, (2) the Senate debate, and (3) the Senate and House Committee reports. These directly pertinent materials compel, we submit, the following conclusions as to the Congressional purpose:

(1) By inserting "port" in Section 3(1), Congress fully understood that the Commission would determine issues of undue preference and prejudice between ports; (2) that in doing so, the Commission would take into account comparative distances and costs, and other relevant factors, all to the view that "commerce be permitted to move freely through as many available ports *as the governing circumstances will* reasonably permit" (emphasis added); and (3) that the Congress specifically rejected the view that carriers serving different ports may establish equalized or parity rates to attract export and import

traffic wholly without regard to any other transportation standard. It is fair to say that the appellees' basic position was argued and rejected in the Congress in 1935.

These conclusions, forced by the history of the 1935 amendment, coincide with the view of this Court in *New York* v. *United States*, 331 U.S. 284, 296–300 (1947), involving the 1940 amendment which inserted in Section 3(1) the words "Region, district, territory" that some meaning must be attributed to the action of the Congress in adding to the entities protected by Section 3(1). In that case, this Court stated (at p. 300) that:

> * * * the addition of "region, district, territory" to § 3(1) did not change the law respecting discrimination by authorizing uniform freight rates, mile for mile, without regard to differing costs of the service. Congress, by adding those words, made plain the duty of the Commission, in determining whether discriminatory practices exist, to consider the interests of regions, districts, and territories, and to eliminate territorial rate differences which are not justified by differences in territorial conditions. In other words Congress did not introduce a new standard of discrimination by its amendment to § 3(1); it merely made clear its purpose that regions, districts, and territories should be the beneficiaries of the law against discrimination.

Recently, three-judge courts in the Districts of Maryland (two cases), Massachusetts and the Southern District of New York have reviewed the Con-

mission's attempts to deal with rail rates on imported iron ore moving from the North Atlantic ports to differential territory. The Commission's first decision in *Iron Ore from Eastern Ports to Central Freight Association Ports*, 291 I.C.C. 527 (1954) and 299 I.C.C. 195 (1956) approved reduced rates from New York and Philadelphia on the Baltimore level, but disapproved as noncompensatory similar reduced rates from Boston. The three-judge court in Maryland in *Baltimore & Ohio R. Co.* v. *United States*, 151 F. Supp. 275 (1957) set aside the Commission's order insofar as it approved reduced rates from New York and Philadelphia, stating, *inter alia* (at p. 274) that "In upholding parity of rates for Baltimore, Philadelphia and New York the Commission has disregarded the disparity of distances and thus in effect has approved a lower rate from Philadelphia and New York than the rate from Baltimore."[6] The three-judge court in Massachusetts sustained the Commission's rejection as non-compensatory of the proposed reduced rates from Boston, in *Boston & Maine Rd.* v. *United States*, 153 F. Supp. 952 (1957), pointed out, *inter alia* (at p. 957) that in any event, under Section 3(1) "the Commission

> would be obliged to give due consideration to the natural geographical advantages possessed by the ports of Baltimore and Philadelphia over the port of Boston in the form of a far shorter railroad route to differential territory.

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[6] This Court's *per curiam* opinion on appeal appears at 355 U.S. 175.

Following additional hearings, the Commission issued its further report and order on imported iron ore sustaining rates from Philadelphia on the same level but rejecting similar rates from New York. A three-judge court in the Southern District of New York, in *New York Central R. Co.* v. *United States*, 207 F. Supp. 483 (June 1962) set aside the Commission's second order insofar as it failed to equalize the rates from New York. However, in so doing the court stated, *inter alia* (at p. 490) that:

> It is undeniable that unlawful discrimination can be effected as readily by giving more transportation for the same price as by charging a higher price for the same transportation.

In December, 1962, in *Baltimore & Ohio R. Co.* v. *United States* (Civil Action 13129) a three-judge court in Maryland set aside the Commission's further order insofar as it approved reduced rates from Philadelphia on the Baltimore level.[7]

Since the Commission issued its reports in this case, it has dealt with other port relationships by taking into account the factor of comparative distances to the ports. Thus, in *Hillsborough County Port Authority* v. *A. & W.R. Co.*, 313 I.C.C. 691 (1961) it found that higher export and import rates at Tampa than at competing ports were unduly prejudicial to Tampa and required equalization of such rates, limited however to interior points with the range of distances between such points and the competing ports. Tampa's participation in the traffic had been negligible.

[7] The Commission has again reopened the Iron Ore case for further hearing.

On July 6, 1962, a three-judge court in the Southern District of Alabama sustained the Commission's order in a *per curiam* decision. *Alabama, T. & N.R. Co.* v. *United States* (Civil Action 2747). Again, in Docket No. 33247, *City of Wilmington* v. *Alabama G.S.R. Co.*, decided June 14, 1962, the Commission held that equalized rates on export and import traffic between interior points, on the one hand, and the ports of Wilmington and Morehead City, N.C., would result in undue preference of Morehead City and undue prejudice to Wilmington when distance to Morehead City exceed those to Wilmington by 25 percent. In so doing, Division 2 stated (p. 24) that:

> The general policy of the Commission in cases of this kind has been to permit or require equalization where the geographically-handicapped port appeared to be at a serious competitive disadvantage by reason of the rate adjustment, provided that such equalization was confined within reasonable limits determined by the needs of the ports concerned, the carriers serving them, and the shipping public. * * *

We submit, therefore, that there is no basis for the view of the court below that the purpose of the 1935 amendment to Section 3(1) was to enable "all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports available" wholly without regard to differences in distance and cost. The court's suggestion (R. 4004) that the Commission's decision "if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port,"

simply does not reflect what was done in this case or in the Commission's general treatment of port cases under Section 3(1). As indicated above, the Commission has permitted or required disregard of distance and cost within limits so as to enable disadvantaged ports and railroads serving them some opportunity to compete for export-import traffic. In other cases, it has found parity unlawful, and required differential rates giving some recognition to the natural advantages of distance-favored ports. A basic flaw in the lower court's decision is its assumption that the Commission's finding of a violation of Section 3(1) "relies on a single subsidiary finding—the distance disadvantage of the northern tier ports." We discuss below the error in this assumption. Here, it is enough to point out not only that the Commission's finding was in terms of distance and cost disadvantages, but also was coupled with the finding that the proposed equalization of rates would result in an undue diversion of traffic from the southern tier ports to New York (R. 3806). Moreover, it is clear that in cases such as this the Commission is to take into account not only factors of distance and cost but the effect upon both ports and carriers of rate parity or rate differentials, as well as any other circumstances relevant in determining whether undue preference and prejudice exists or would be created. Clearly, the Commission's task in dealing with the structure of export-import rates is that described by this Court in *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593 (1949) in referring to the coal rate structure:

> * * * We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differently related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. * * *

C. THE COMMISSION'S FINDINGS SUPPORT ITS CONCLUSION THAT THE PROPOSED RATES TO AND FROM THE NORTHERN TIER PORTS WOULD VIOLATE SECTION 3(1)

We contend that the detailed findings of fact in the Commission's two reports fully support its conclusion that the reduced rates on export-import traffic proposed by the railroads serving the northern tier ports would result in undue preference of the northern tier and undue prejudice to the southern tier ports. While its painstaking analysis of this complicated problem cannot be fully reflected here, some of its principal findings may be summarized as follows:

1. Except for [temporary disruptions] "no increase has been made in the differentials which favor the southern tier ports for over 80 years. But the increase in rate levels which occurred over those years has proportionately decreased their significance. For example, the sixth-class rates between Chicago and New York-Baltimore were 25 cents and 32 cents from

1877 to 1914. If the increases since authorized, through Ex Parte No. 206, had been applied to those rates they would now be 115 cents and 99 cents respectively, and would reflect a differential of 16 cents. The increased value of goods has likewise diminished the importance of the differential" (R. 3744–3745).

2. The present differentials are smaller than they would be if allowed to be set by competitive factors (R. 3805). "Domestic class rates generally reflect differences in distance and service. * * * the class rates from Chicago for example, for classes 20 to 100, are from 10 to 48 cents higher to Boston than to Baltimore, and from 6 to 30 cents higher than to New York" (R. 3852).

3. "Ocean-borne commerce is classified into two types of cargo. By far the largest in volume is bulk cargo. It consists generally of low-value, heavy-volume raw materials which are handled at the port by mechanical facilities and [fol. 4985] provide bottom loading for ships or may move as full cargoes. The other type, called general cargo, includes principally manufactured and semimanufactured goods of relatively high value, which are usually packaged. General cargo generally constitutes the more profitable 'top loading' for ships in a balanced cargo operation.

"The type of traffic determines the character and to a large extent the cost of the port terminal service which the port railroads perform in delivering traffic to or receiving traffic from the ship, although the facilities employed may vary widely depending upon the physical characteristics of the harbor used. An-

other important distinguishing characteristic lies in the relative commercial and economic benefits which a port derives from these different types. General cargo, which requires the performance of various and numerous services, including handling and stevedore service and the supplementary port services hereinafter described, provides greater employment and produces a far greater revenue per ton for the port community through which it moves than does bulk cargo, which is mostly handled by specialized mechanical facilities such as those used in unloading grain and coal. However, both types of cargo are considered essential to a healthy port economy" (R. 3753–3754).

4. New York's relative share of the total of United States ocean-borne exports and imports declined from 28.6% in 1923 to 14% in 1956, and Boston's declined from 4.7% to 2.5%, while both ports showed tonnage increases. "The share of the southern tier ports in total United States imports and exports increased from 1923 to 1956 as follows: Philadelphia from 7.9 to 15.7 percent; Baltimore from 8.4 to 10.4 percent; and Hampton Roads from 4.3 to 17.1 percent. Bulk cargo accounted for most of this increase" (R. 3756–3757). The principal bulk cargo moving through North Atlantic ports includes petroleum, ores, grain and coal (R. 3754). Little or none of the crude petroleum imported through the North Atlantic moves to differential territory (R. 3754). Imported iron ore (the rates of which are involved in separate proceedings) enters for the most part through Baltimore and Philadelphia. Coal (the rates on which are not in issue) is

the chief export, with the great preponderance moving through Hampton Roads (R. 3755).

"From the standpoint of volume, grain is the second most important commodity exported through these ports, increasing from 4.2 million tons in 1923 to 5.4 million tons in 1955. It is the chief export and by far the most important bulk commodity, of the tonnage moving to and from the affected territory. From 1923 to 1955 there were large increases in the tonnage to Baltimore and Hampton Roads, a lesser increase to Albany, and a decrease in the volumes through New York, Philadelphia, and Portland. The net result was an increase from 58 to 73 percent of the north Atlantic port total for the southern tier ports, and a drop from 42 to 27 percent of that total for the northern tier ports. Grain requires special port terminal facilities and moves largely in full cargo lots. The 1955 movement was distributed as follows: Baltimore 2.3 million tons, Hampton Roads 1 million, Albany 0.8 million, Philadelphia 0.7 million, New York 0.4 million, with Boston and Portland dividing 0.2 million tons" (R. 3755–6). However, elsewhere in its report (R. 3769–3770) the Commission pointed to recent trends as a result of which "[Baltimore's] share of north Atlantic [grain] exports declined from 47.6 percent in 1952 to 36.2 percent in 1956 and 25.4 percent in the first 9 months of 1957. In the same period Norfolk's share increased from 5.6 percent to 19.9 percent, Boston's share from 5.6 percent to 14.5 percent, and New York's share from 6.4 percent to 11.1 percent."

5. New York's "increasingly less favorable position relatively during the period stems largely from its failure to participate in the large increase in the export movement of coal, its generally smaller share of the increasing exports of grain, and its inability to share proportionately in the burgeoning imports of petroleum and ores, especially iron ore" (R. 3757–8). "Also contributing to the decline in New York's relative position as to total United States exports and imports has been the rapid growth since World War II of trade through the South Atlantic, Gulf, and Pacific ports, due in large measure to the expanding population and industrial development in the areas tributary to those ports" (R. 3759).

6. In 1955, considering all north Atlantic foreign trade, "New York handled more tonnage of all commodities than any of the southern tier ports; excluding petroleum, coal, and iron ore, it handled nearly as much as those ports combined; and it handled about 60 percent more general cargo exports than those ports combined" (R. 3760).

Turning to the movement of export-import traffic between the North Atlantic ports and the differential territory, the Commission found that the record lacks comprehensive evidence as the trends in such traffic (R. 3762, 3765). However, it summarized the results of a study for the 12 months ending July 31, 1956, as follows (R. 3767–3768):

> Of a total of about 11 million tons of exports and imports, exclusive of import petroleum and iron ore and export coal, handled between the north Atlantic ports and the

affected territory in the year ended July 31, 1956, about one-third moved through the northern tier ports. The preponderance of the tonnage passed through the southern tier ports, but as to imports the excess consisted almost wholly of ores and concentrates other than iron ore, and as to exports it was represented entirely by grain and grain products. Of the [fol. 5001] only other group of importance in this case, manufactures and miscellaneous, almost two-thirds of the exports and over one-half of the imports were handled through the northern tier ports. Thus, the evidence demonstrates the ability of those ports as a group to attract the preponderance of the tonnage, except as to export grain and import ores and concentrates, the movement of which appears to be largely attracted to the southern tier ports because of more adequate facilities or other circumstances relating peculiarly to those commodities, discussed later in this report.

The complete dominance by New York of the north Atlantic general-cargo traffic to and from the affected territory is clear. Of imports, its volume exceeded that of all the other ports combined, was more than double that of Baltimore, and almost four times that of Hampton Roads. As to general-cargo exports, New York's volume was 62.7 percent of the total volume for all of the ports and over 50 percent greater than that of the southern tier ports combined. Also, it was more than double the Baltimore volume and more than ten times that of Hampton Roads.

Both as to the total exports from the affected territory and the total imports handled to that

territory, New York's volume was more than double that of Hampton Roads, and about three times that of Philadelphia. Baltimore's tonnage surpassed New York only because of its large volume of export grain and of import bulk ores, other than iron ore.'

7. "* * * the volume of foreign traffic having its origin or destination in the effected territory which those ports attracted prior to the equalization of the ocean rates is not revealed. Consequently, we are unable to find support for the assertion that the disparity in through charges created has diverted traffic from the northern tier ports, to the disadvantage of the [appellee carriers]" (R. 3804–5).

8. New York has a preponderance of excellent steamship services as compared with the southern tier ports, and its general cargo services far surpass those at such ports, and afford much more frequent sailings and service to and from a far wider range of trading areas (R. 3777); in addition, New York's supplementary port services (e.g., freight forwarding, banking, marine insurance, etc.) are superior to those of the southern tier ports (R. 3779–3781).

9. Some shippers testifying in support of the proposed rate equalization "regard the differential adjustment as a controlling consideration" in their choice of a port (R. 3783). However, the Commission found that New York, with its more frequent sailings and other advantages attracted away from Boston much of the export-import traffic moving to and

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[1] The results of this study are also reflected in Appendices E and F of the Commission's original report (R. 3735–6).

from New England points. The Commission concluded (R. 3785) that:

> Considering that most of the general-cargo traffic of the north Atlantic ports here concerned is attracted to New [fol. 5021] York despite its differential over the southern tier ports and over Albany, the failure of Boston, with rates the same as New York, to attract a larger volume of the traffic must be ascribed to factors other than an unfavorable rate relationship, chief of which are the superior steamship and port services which New York affords. The fact, as above shown, that much of the New England export-import traffic moves through New York confirms this. As to grain from the affected territory, traffic said to be more sensitive to rate differences than general cargo, Boston has been able (as shown in appendix F) to attract considerably more than New York, and about 2.5 times as much as Albany, which has lower rates. Such a marked difference in Boston's ability to attract these two types of traffic strongly suggests the existence of influences affecting the choice and use of ports far more powerful than the present port differentials. * * *

The Commission similarly noted (R. 3801) that a number of manufacturers located in or near Baltimore make a substantial portion of their export shipments through New York.

8. The southern tier ports and the railroads serving them have concentrated on attracting bulk commodities, chiefly grain and bulk ores for which they have provided specialized loading and unloading fa-

cilities (R. 3768–3771). Thus, during the years 1946 to 1955, in which $121.3 million for general cargo facilities and $28.7 million for specialized facilities were invested in New York and Boston, the southern tier ports saw expenditures of $20.9 million for general cargo facilities and $81.2 million for specialized facilities (R. 3771). "As bulk commodities, because of their law value, are peculiarly sensitive to transportation cost, the differential has greater influence on their movement than on general cargo" (R. 3800).

9. Rate equalization "would not materially affect the flow of traffic" through Boston, Portland and Albany. New York in 1955–1956 "was able to attract 2.8 million tons of general cargo while Boston with the same rates as New York, obtained only 21,000 tons of such traffic. Albany, with rates on the level of Philadelphia, has not participated significantly in the traffic to and from differential territory, except for export grain" (R. 3848), and as to grain Albany handled much less than Boston or Philadelphia although it enjoys rates lower than Boston and on the same level as Philadelphia (R. 3820, 3844).

10. "The average of the short-line distances from * * * points in the affected territory is 698 miles to Baltimore, 750 miles to Philadelphia, 804 miles to New York, and 921 miles to Boston. The average distance between Hampton Roads ports and the affected territory is 883 miles as compared with 853 miles between that territory and New York" (R. 3773). "The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports, are firmly

established" (R. 3805–6). The Commission also referred to the claims of the southern tier lines and ports "fully substantiated of record, as to [their] geographical, transportation, and cost advantages" (R. 3854). This finding is supported by studies indicating relative rail costs to and from the various ports (R. 2391–2412; 2983–3058).

The Commission's ultimate conclusions. The Commission's ultimate conclusions were drawn from the findings of basic facts partially summarized above. Again, we submit that the validity of those conclusions must be measured in terms of the real and precise issue before the Commission (and this Court). This issue is whether, under the facts, the Commission is required to *enforce or impose* rate parity as to the traffic involved upon the railroads serving the North Atlantic ports. Moreover, since this proceeding arose under Section 15(7) of the Interstate Commerce Act, the railroads serving the northern tier ports bore the burden of proving that "equalizing" rates on this traffic would be lawful in all respects.

In support of the ultimate finding that enforced rate parity would cause undue preference of and advantage to the northern tier ports separately and collectively, and undue prejudice and disadvantage to the southern tier ports, the Commission concluded, first, "that, so far as Boston, Portland, and Albany are concerned, such equalization would not materially affect the flow of foreign traffic through any of those ports" (R. 3854). A fact of life apparent from this record is that the ports of Boston, Portland and Albany are overshadowed competitively by New York,

and that if those three ports plus New York achieved rate parity with the southern tier ports, New York would be the almost exclusive beneficiary of such enforced equalization. Stated otherwise, these three northern ports are primarily competing against New York, rather than Baltimore and Hampton Roads. We submit that the Commission was entitled, if not required, to draw this conclusion from the fact that Boston, with rates at the New York level, and Albany, with rates below New York at the Philadelphia level, simply have not been significant competitors of New York with its frequent sailings and other undisputed advantages as described in the Commission's report. If the rates to and from Boston were reduced to the Baltimore level while the New York and Boston rates were required to remain at higher levels, this would result, as the Commission pointed out (R. 3852), in violations of the long-and-short-haul provisions of Section 4 of the Act.

Thus, the case tends to center, as it has again and again since 1877, upon the competitive relationships between New York, on the one hand, and the southern tier ports on the other. As to this, the Commission concluded (R. 3806):

> * * * the record is clear that New York continues to attract more of the highly desirable general-cargo tonnage so vital to its port economy than all of the other north Atlantic ports combined; that to obtain a volume of traffic which will support a much lower level of port activity and range of shipping services than New York, the southern tier ports have been depending heavily on bulk-cargo tonnage; and

that, considering the volume and character of the traffic disclosed by the traffic study, and other evidence of circumstances which induce or deter the flow of the subject traffic, undue diversion from those ports to New York, at least of most types of that traffic, would result from the proposed equalization. The comprehensive showing in that study strongly refutes the claim of the respondents and their supporting port interest that such equalization is required to enable them to meet the competition of the southern tier ports and to effect a reasonable and nonpreferential rate relationship as between the opposing port groups.

The Commission's conclusion that enforced rate parity would result in an undue diversion of traffic from the southern tier ports to New York is fully supported by the subsidiary findings summarized above. Obviously, New York's present dominance in general cargo would be enhanced if the railroads serving the southern tier ports were required through equalized rates to ignore their transportation advantages of distance and cost. Moreover, the divertibility of bulk traffic by small rate changes is a well-known fact which underlies decades of difficulty in the grain and coal rate structures in this country. See *Ayrshire Collieries Corp.* v. *United States*, *supra*., at p. 586. Thus, the Commission found that the present differentials, though diminished in importance with the passage of time and less than competition would produce, were necessary to enable the southern tier ports to use some of their geographical advantage to compete against the dominant port of New York.

After referring to the shorter distances and lower costs of service to and from the southern tier ports, the Commission pointed out that approval of the proposed rate reduction to the northern tier ports would require approval of the conditional rate reductions proposed by the southern tier ports—thereby restoring the differentials at a lower rate level. As the Commission stated (R. 3806):

> This might result in the rates gravitating to their lowest possible level and in a needless dissipation of carrier revenues. We have been given the power to fix rates, among other reasons, for the purpose of preventing destructive competition and promoting the financial stability of the regulated carriers.

The opinon below did not even discuss this aspect of the Commission's decision.

At this point, it should be emphasized that none of the appellees (railroads or ports) is proposing that the differentials should be maintained at a lower level. Rather, as stated in their Motion to Affirm (p. 23) they contend that "if the appellee railroads reduce their rates to a basis of equality with the rates of appellant railroads as a matter of necessity in order to meet competition, then a retaliatory reduction by appellants must be condemned as 'unnecessary to meet competition.'"

The court below apparently adopted the appellees' position, but through a chain of reasoning which is wholly erroneous. The Commission's order was issued as a result of its suspension and investigation, pursuant to Section 15(7), into the lawfulness of pro-

posed rates. The court below stated that "the Commission has failed to distinguish between rates which carriers may voluntarily publish to meet competition pursuant to Section 15(7) and rates which carriers, on complaint under section 3(1), may be required to change" (R. 4004). From this it concluded that "the primary issue is whether equalization is necessary to enable the [appellee] railroads to compete" (R. 4005). Simultaneously, it held that the rights or interests of competing ports under Section 3(1) were not properly in issue before the Commission. Thus, the court below stated in obvious criticism that the Commission's reports "give continuous indication that the Commission regarded this as a 'port' case, not a 'railroad' case. For example, the [Commission's] observation that 'in the rare instances where rate changes in port relationships have been required by us, distance has been an important consideration', while perhaps true, was totally irrelevant to the issue before it" (R. 4004).

As the appellees' put it in their Motion to Affirm (pp. 20-21):

> * * * In a Section 3(1) complaint proceeding, the Commission, as the Court recognizes, could properly find that a rate difference maintained between different points is justified and proper where greater distance, and its concomitant greater costs to the carrier, are shown as a matter of record. But the Court goes on to point out the irrelevance of a finding as to higher costs due to greater distances in a Section 15(7) proceeding, as here, where the car-

> riers deem the absorption of such higher costs necessary if they are to effectively compete at rates otherwise lawful.

In so stating, the appellees put in blunter terms than the court below the proposition that the Commission in exercising its investigation and suspension powers under Section 15(7) of the Interstate Commerce Act (49 U.S.C. 15 (7)) may not take into account comparative distances and costs in determining the lawfulness of rates to and from the various ports on export-import traffic, but may do so in a proceeding instituted by a complaint alleging a violation of Section 3(1). Such a reading of the lower court's opinion finds support in its judgment which enjoins the Commission's order insofar as it "prevents differential-eliminating rates from becoming effective."

The holding below amounts to saying that the railroads serving the northern tier ports (New York, Boston, Albany and Portland) have a statutory right to put into effect reduced rates which violate Section 3(1) by creating undue preference and prejudice as between the northern tier ports and the southern tier port, and to maintain such unlawful rates until they are found to be unlawful in a separate proceeding several years later. This contention is inconsistent with any conceivable standard of effective regulatory procedure. It flies in the teeth of the express provision of Section 15(7) that in proceeding under that section "the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective," i.e. in the

complaint procedure referred to by appellees. It was specifically rejected by this Court in *Ayrshire Collieries Corp.* v. *United States*, *supra*, pp. 581–583. It is inconsistent with this Court's recently expressed recognition of the relevance, in a proceeding under Section 15(7) of the interrelationships between rates on imported iron ore from these same North Atlantic ports to differential territory. *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 355 U.S. 175, 178 (1957).

We have already pointed out that the 1935 amendment to Section 3(1), in adding "ports" to the entities entitled to protection under Section 3(1), necessarily rejected the view that the competitive motives of a port and the railroads serving it override every other consideration of public interest and sound national transportation policy. As noted above, Congress, in 1935, specifically refused to require that a railroad serving a port should have an unqualified right to reduce rates to the level of a competing railroad serving another port; and that Congress did so with the specific knowledge that by rejecting Senator Long's amendment, differences in distance and other transportation factors would enter into the resolution of such issues.

We submit, therefore, that the court below erred, both as to the scope of a proceeding under Section 15(7) and as to the intended result of the 1935 amendment to Section 3(1). However, we do not suggest a remand to the lower court; rather, we believe that that court should be directed to sustain the Commission's order.

Above, we have shown that discrimination, i.e., preference and prejudice, can be caused by charging the same rate for different transportation services for different persons. We have shown that on this record the Commission was justified in finding that enforced rate equalization between the railroads serving the northern and southern tier ports, respectively, would unduly prejudice the latter by failing to recognize their natural advantages and thereby causing an undue diversion of export-import traffic to New York, the already dominant North Atlantic port. The rate reduction proposed by the railroads serving the northern tier ports was matched by the railroads serving the southern tier ports filing tariffs with lower rates which would have restored the established differentials at a lower level. Since, as we have shown, the Commission was not required by law to enforce rate equalization, the next question, not discussed by the court below, was how it should deal with the incipient rate war. The Commission's finding that such an imminent drop in the *level* of the differential rate structure would result in a needless dissipation of carrier revenues, was not challenged by any contention that the rates on this traffic to the southern tier ports were too high. Rather, it was clear that the original and countervailing rate proposals immediately threatened a renewal of the old rate wars on this precise traffic which led to railroads' establishment of approximately these very differentials in 1877. In addition, the Commission found that "The present differentials have long been served to

retain a reasonable competitive relationship between the principal port groups and should be maintained" (R. 3806).

Since the Commission has found that the structure of rates in question is lawful and reasonable, and that the proposal for enforced parity would violate Section 3(1), it was doubly appropriate for the Commission to use its minimum rate powers to preserve the present differentials. First, it may use its minimum rate powers to eliminate the undue preference and prejudice between ports prohibited by Section 3(1), as it may to eliminate undue preference and prejudice between regions. *New York* v. *United States*, 331 U.S. 284, 340-343 (1947). Secondly, it may use the same minimum rate power to prevent the erosion of a lawful and reasonable rate structure by destructive rate wars. *Youngstown Sheet & Tube Co.* v. *United States*, 295 U.S. 476 (1935); *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 590 (1949). These cases point out the inapplicability of *United States* v. *Chicago, M. St. P. & R. Co.*, 294 U.S. 499 (1935), where, as here, the Commission has found the existing rate relationship to be reasonable. In any event, where, as here, the sole issue is whether the Commission must enforce rate parity at the Baltimore level, and no one urges that the differentials should be preserved at a lower rate level following offsetting rate reductions, the Commission clearly acted properly in preventing a violation of Section 3(1) by maintaining the differentials at the present rate level. Its action was clearly consonant with the command of the Na-

tional Transportation Policy that the Act be so administered as to "foster sound economic conditions in transportation and among the several carriers" and to preserve a transportation system adequate for the Nation's needs.[9]

It begs the question to say that what the Commission did in this case was to allocate traffic between the ports. Of course, whatever the Commission did in a case like this would have some effect upon shippers' choices in the routing of export-import traffic by particular routes and ports. We contend that here the Commission did exactly what the Congress intended when, by adding "ports" to Section 3(1) in 1935, it reiterated its purpose that these competitive export-import rate problems be determined by the Commission, and its further purpose that these problems be decided in the light of such transportation factors as relative distance, rather than solely in terms of competitive necessity as the court below erroneously held. We have pointed out that, as in the *Galveston* v. *New Orleans* situation which led to this Court's *Texas & Pacific* decision, the Commission has re-

[9] The following may be noticed as to the revenue needs of several railroads involved in this case: New Haven is in reorganization under Section 77 of the Bankruptcy Act; Boston & Maine, Erie-Lackawanna, and New York Central are the recipients of Federal loan guarantees under Section V of the Interstate Commerce Act; the Erie-Lackawanna merger was a marriage of financial necessity. *Maintenance of Way Employees* v. *United States*, 366 U.S. 169. The Commission's recent approval of Chesapeake & Ohio's acquisition of control of Baltimore & Ohio was based in part upon the latter's financial necessity. *Chesapeake & Ohio R. Co.—Control—Baltimore & Ohio R. Co.*, Finance Docket 21160, decided December 17, 1962.

quired differential rates to enable a dominated port to gain some competitive advantage from its geographically favored position. Again, as in the case of Tampa and Morehead City, the Commission has required rate equalization in the face of partial distance disadvantages to enable the disadvantaged and dominated port to compete for some of the traffic involved. And in so enforcing either rate differentials or rate equalization, the Commission has done so only within limits measured by differences in distances. Coming closer to this case, the Commisison, following *New York Central R. Co.* v. *United States*, 99 F. Supp. 394 (1951), affirmed, *per curiam*, 342 U.S. 890, enforced equalized rates on export grain moving from Buffalo, on the one hand, to New York, Albany, Philadelphia and Baltimore (thereby ending a differential in favor of Philadelphia and Baltimore) when the distances involved were substantially the same and where the northern ports had been getting little of the export grain traffic. *Export Grain from Buffalo to New York*, 292 I.C.C. 647 (1954).

The Commission has never required rate equalization in disregard of significant differences in distance (and cost) where the effect would be diversion of traffic from the geographically favored ports to an already dominant port (New York). In thus taking into account all of the circumstances involved in a competitive export-import rate situation, the Commission avoids the extreme anticipated by the court below, i.e., the concentration of such traffic in "the most distant favored port". At the same time, it has never so exercised its powers as to deprive ports and

railroads with natural advantages of an opportunity to compete in terms of such advantages.

Here, the Commission concluded, upon a balance of many factors, that enforced rate equalization would unduly prefer the northern tier ports. At the risk of oversimplification, it may be said that the Commission balanced New York's advantages, e.g., frequent sailings, and its dominance of the general cargo traffic (with the greater employment and other port benefits which such traffic produces than does bulk traffic) against the dependence of the southern tier ports upon bulk cargo plus the distance and cost advantages of the railroads serving the latter ports. We submit that its conclusion, on this balance, that it should not impose upon the North Atlantic ports a rate parity which would result in a substantial diversion of traffic from the southern tier ports to New York; has a rational basis.

II

THE COMMISSION'S ORDER WAS VALID AS AN EXERCISE OF ITS MINIMUM RATE POWERS TO PREVENT NEEDLESS DISSIPATION OF CARRIER REVENUES

Even if the court below were correct in its conclusion that issues of undue preference and prejudice under Section 3(1) may not be determined in a proceeding instituted under Section 15(7), it does not follow that the Commission was powerless to act to avert a rate war with attendant dissipation of carrier revenues.

The purpose of the rate reductions proposed by the appellee railroads was to bring about an enforced

equalization of rates to and from all of the North Atlantic ports. As they have put it bluntly, they must be allowed freedom to reduce their rates to the Baltimore level for competitive purposes, but the railroads serving the southern tier ports must be denied similar freedom to counter with rate reductions which would restore the present differentials. Thus, they argue that a rate war (such as led to the original establishment of the differentials) cannot occur.

We know of no basis for the contention that the southern lines can thus be deprived of the same competitive freedom to put into effect reduced rates warranted by their relative distance and cost advantages. As the Commission stated in *Lake Cargo Coal*, 139 I.C.C. 367, 391 (1928):

> * * * Of course the southern carriers are not the only ones who may assert a right to an immune managerial discretion. Their rights in this regard can not be superior to the rights of other carriers. If conceded to them, * * * then in like circumstances we must concede the same right to each and every set of carriers which may claim it. * * *

Accordingly, the Commission correctly concluded (R. 3806) that in view of the distance and cost advantages of the southern lines, "approval of [appellees] proposed rates would require alternate approval" of the counter rate reductions proposed by the southern lines.

The Commission found that "The present differentials have long served to retain a reasonable competitive relationship between the principal port

groups and should be maintained" (R. 3806). There is not even a contention that the present rates to and from the southern tier ports are unreasonably high The Commission further noted (R. 3805) that "section 15a(2), among other things, requires us to consider the effect of rates upon the movement of traffic, and the national transportation policy stresses the importance of maintaining a national transportation system adequate for commerce and the national defense." As we have pointed out, the appellees "competition" argument would lead to a rate war which no one wants, for the appellees seek enforced rate equalization—not a continuance of the differentials at a lower rate level. Thus, the Commission was uniquely warranted in concluding that approval of countervailing rate reductions "might result in the rates gravitating to their lowest possible level and in a needless dissipation of carrier revenues." The Commission action in preventing such consequences was a proper exercise of its minimum rate powers under Section 15. *Ayrshire Collieries Corp.* v. *United States, supra.*

III

THE DISTRICT COURT ERRED IN MAKING ITS INDEPENDENT DETERMINATION THAT THE PROPOSED REDUCED RATES TO THE NORTHERN TIER PORTS ON EXPORT-IMPORT TRAFFIC WERE JUST AND REASONABLE

In addition to its findings under Section 3(1), the Commission concluded that the proposed reduced rates to the northern tier ports "are not shown to be just

and reasonable" (R. 3807).[10] Under Section 15(7), the burden of establishing the lawfulness of proposed rates is on the proponent of the rates. The Commission's conclusion was based upon its finding (R. 3797) that the available evidence as to the costs to New York,

> * * * indicates that the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs. However, a presentation of costs adequate to determine whether the proposed rates would be reasonably compensatory should embrace all types of traffic which those rates are expected to attract, and should reflect the costs of the specific methods by which they would be handled. It may be that other traffic would be forced to absorb a larger portion of the constant cost in order to maintain a national transportation system conforming to the ultimate objectives of the national transportation policy.

The court below, however, concluded (R. 4000–4001) that:

> the [appellees] presented proof that the proposed rates are just and reasonable. In view of the minimal amounts of the proposed reductions (reduction in revenue from Chicago to

[10] A finding that the proposed reduced rates to and from the northern tier ports were not just and reasonable (i.e., compensatory in the sense of at least covering out-of-pocket costs), was not essential to the Commission's finding of a violation of Section 3(1). It is settled that rates within the range of reasonableness may create undue preference and prejudice in violation of Section 3(1). *New York* v. *United States*, 331 U.S. 284, 344–346 (1947).

> Boston would be .08 cents per ton-mile on first-class traffic and .10 cents on Column 13 traffic, for example), the plaintiffs relied on a prima facie showing of revenues. There was testimony that, using representative origins and destinations and the proposed rates, for 96.8 per cent of all tonnage moving through the port of New York, the import traffic averaged a rate per ton of $19.20 and revenues per ton-mile of 2.47 cents, and that for export traffic these figures were $18.00 and 2.32 cents. In comparison the average revenue per ton-mile for Class I railroads in the United States is 1.384 cents.
>
> The defendant railroads countered this evidence by showing that with respect to traffic through the port of New York the proposed rates were insufficient to return out-of-pocket costs. But, while it refused to find the rates compensatory, the Commission did find after restating and adjusting the cost evidence, that "the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs."
>
> On this evidence the plaintiffs certainly established prima facie that the proposed rate schedule is just and reasonable. * * *

In thus making the independent finding that the appellee railroads had met their statutory burden of showing the proposed reduced rates to be just and reasonable, the court below relied upon "the minimal amounts" of the reductions, revenue comparisons, and the Commission's finding that from and to New York "the revenue from the proposed rates would equal or exceed by a very small margin the estimated out of pocket costs."

Even if the making of such a finding had been a proper function for the lower court, the materials upon which it relied did not support its finding. Its statement that proposed rate reductions were for "minimal amounts" does not prove that lower rates would be compensatory, particularly in the absence of any cost evidence that the present rates are compensatory. The lower court's assertion that on export-import traffic moving through New York the reduced rates would produce revenues per ton and per ton mile in excess of the average revenue per ton mile for Class I railroads in the United States, is meaningless in that it is not related to the services to be rendered under these particular rates and the costs of performing them. To infer the profitability of the proposed rates from such a generalized comparison of revenues was particularly improper in the face of specific cost evidence that the rates to and from New York would only "equal or exceed by a very small margin" the out-of-pocket costs.

Finally, it was equally improper for the court below to infer that the reasonableness of the proposed rates was demonstrated by the Commission's finding that the revenue from New York rates "would equal or exceed by a very small margin" the out-of-pocket costs. Rates which barely meet out-of-pocket are not necessarily just and reasonable, i.e., compensatory, as a matter of law. Rather, as stated by Judge Friendly in *New York Central R. Co.* v. *United States*, 207 F.

Supp. 483, 495 (S.D. N.Y., 1962) (one of the iron ore port differential cases):

> We do not doubt the power of the Commission, on proper findings, to proscribe as too low a rate which, although covering long term out-of-pocket costs, fails to meet fully distributed ones. Some traffic must pay for the "non-variable" portion of operating expenses and property taxes and meet the deficits occasioned by traffic (such as the passenger business) that does not pay its way. If the Commission thinks a particular carrier should not haul particular traffic at a rate that will not contribute to such expenses, that is a judgment competent for the Commission to make. * * *

In any event, the court below assumed administrative functions in making an independent determination from such materials that the appellee railroads had sustained the burden of showing that the proposed rates would be just and reasonable. As a minimum, this issue should have been remanded to the Commission, and the lower court's failure to do so was clearly erroneous. *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481 (1934).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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JANUARY 1963.

APPENDIX

The National Transportation Policy (Preamble to 49 U.S.C. 1) and the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1 *et seq.*), provide as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * * *

SEC. 1 * * * (5) All charges made for any service rendered or to be rendered in the trans-

portation of passenger or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * * * *

SEC. 3(1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * * * *

SEC. 4(1). It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon ap-

plication to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

* * * * * *

SEC. 15(1). Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the

Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

SEC. 15 * * * (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or prac-

tice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complant, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as

by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

* * * * * *

SEC. 15a. * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.